90-371

(1)

No. 90-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

LOIS MORALES,

Petitioner,

vs.

KANSAS STATE UNIVERSITY,
KANSAS BOARD OF REGENTS, and
JON WEFALD, PRESIDENT OF KANSAS
STATE UNIVERSITY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
TENTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED

1. Is a state court-reviewed Kansas Civil Service Board order entitled to preclusive effect in a Title VII action pursuant to 28 U.S.C. 1738?

PARTIES TO THE PROCEEDING

All parties to the proceeding in the Tenth Circuit Court of Appeals are listed in the caption of the case in this Court.

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PETITION FOR WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

The Petitioner, Lois Morales, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Tenth Circuit Court of Appeals entered in this proceeding on May 30, 1990.

OPINIONS BELOW

There are no official or unofficial reports of any opinions in the courts below. However, the non-published decision of the Tenth Circuit Court of Appeals is appended hereto as Appendix A.

JURISDICTION

In this instance, the Petitioner timely filed her charge with the Equal Employment Opportunity Commission (EEOC). She received her right to sue letter and timely filed her complaint in the United States District Court for the District of

Kansas within ninety (90) days on September 1, 1988. On March 28, 1989, Defendant Kansas State University (KSU) filed its motion for summary judgment. On June 19, 1989, Petitioner timely filed her response to this motion for summary judgment. On October 6, 1989, the United States District Court entered an order granting judgment for KSU and against the Petitioner.

On October 16, 1989, the Petitioner timely filed a motion to alter or amend judgment. On October 24, 1989, KSU timely filed a response to the motion to alter or amend judgment. On November 28, 1989, a memorandum and order was entered denying the motion to alter or amend judgment. An appeal was made to the Tenth Circuit on December 28, 1989. That court entered its order on May 30, 1990. Jurisdiction is in this court pursuant to 28 U.S.C 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

"28 U.S.C. 1738. State and Territorial statutes and judicial proceedings; full faith and credit.

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947."

"42 U.S.C. 2000e-5(f)(3). Enforcement provisions.

". . . Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought."

"K.S.A. 44-1009. Unlawful practices; unlawful discriminatory practices. (a) It shall be an unlawful employment practice: . . .
(4) For any employer, employment agency or labor organization to discharge, expel or otherwise discriminate against any person because he has opposed any practices or acts forbidden under this act or because he has filed a complaint, testified or assisted in any proceeding under this act. . . ."

K.S.A. 44-1011. Enforcement of commission orders; judicial review;

procedure. (a) The commission, attorney general or county or district attorney, at the request of the commission, may secure enforcement of any final order of the commission in accordance with the act for judicial review and civil enforcement of agency actions. The evidence presented to the commission, together with its findings and the order issued thereon, shall be certified by the commission to the district court as its return. No order of the commission shall be superseded or stayed during the proceeding on review unless the district court shall so direct.
(b) Any action of the commission pursuant to the Kansas act against discrimination is subject to review in accordance with the act for judicial review in accordance with the act for judicial review and civil enforcement of agency actions except: (1) As provided by K.S.A. 44-1044 and amendments thereto; (2) the attorney general or county or district attorney, in addition to those persons specified by K.S.A. 77-611 and amendments thereto, shall have standing to bring an action for review, and (3) on review, the court shall hear the action by trial de novo with or without a jury in accordance with the provisions of K.S.A. 60-238 and amendments thereto, and the court, in its discretion, may permit any party or the commission to submit additional evidence on any issue. The review shall be heard and determined by the court as expedi-

tiously as possible. After hearing, the court may affirm the adjudication. If the adjudication by the commission is not affirmed, the court may set aside or modify it, in whole or in part, or may remand the proceedings to the commission for further disposition in accordance with the order of the court.
The commission's copy of the testimony shall be available at all reasonable times to all parties for examination without cost, and for the purpose of judicial review of the order. The review shall be heard on the record without requirement of printing.
The commission shall be deemed a party to the review of any order by the court.

"**K.S.A. 75-2925. Purpose of act.** The general purpose of this act is to establish a system of personnel administration that meets the social, economic and program needs of the people of the state of Kansas as these needs now or in the future may be established. This system shall provide means to recruit, select, develop and maintain an effective and responsible work force and shall include policies and procedures for employee hiring and advancement, training and career development, job classification, salary administration, retirement, fringe benefits, discipline, discharge and other related activities. All personnel administration actions regarding employees in the state classified service shall be made without regard to race,

national origin or ancestry, religion, political affiliation, or other non-merit factors, and shall not be based on sex, age or physical disability except where sex, age or physical requirements constitute a bona fide occupational qualification necesssary to proper and efficient administration. Personnel administration actions shall be based on merit and fitness to perform the work required and shall provide fair and equal opportunity for public service.

"**K.S.A. 77-618. Review of disputed facts, extent.** Judicial review of disputed issues of fact shall be confined to the agency record for judicial review as supplemented by additional evidence taken pursuant to this act, except that review of:

(a) Orders of the director of workers' compensation under the workmen's compensation act shall be in accordance with K.S.A. 44-556 and amendments thereto;

(b) orders of the commission on civil rights under the Kansas act against discrimination or the Kansas age discrimination in employment act shall be in accordance with K.S.A. 44-1011 and 44-1021, and amendments thereto;

(c) orders of the secretary of human resources under K.S.A. 72-5413 through 72-5431, and amendments thereto, shall be in accordance with K.S.A. 72-5430a and amendments thereto; and

(e) orders of the state fire marshall under K.S.A. 31-144 and

amendments thereto shall be in accordance with that section."

"K.S.A. 77-619. Additional evidence. (a) The court may receive evidence, in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

(1) Improper constitution as a decision-making body; or improper motive or grounds for disqualification, of those taking the agency action; or

(2) unlawfulness of procedure or of decision-making process.

(b) The court may remand a letter to the agency, before final disposition of a petition for judicial review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if:

(1) The agency was required to base its action exclusively on a record of a type reasonably suitable for judicial review, but the agency failed to prepare or preserve an adequate record;

(2) the court finds that (A) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover, or did not know and was under a duty to discover but could not

reasonably have discovered until after the agency action, and (b) the interests of justice would be served by remand to the agency;
(3) the agency improperly excluded or omitted evidence from the record; or
(4) a relevant provision of the law changed after the agency action and the court determines that the new provision may control the outcome."

"K.S.A. 77-621. Scope of review.
(a) Except to the extent that this act or another statute provides otherwise:
(1) The burden of proving the invalidity of agency action is on the party asserting invalidity; and
(2) the validity of agency action shall be determined in accordance with the standards of judicial review provided in this section, as applied to the agency action at the time it was taken.
(b) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based.
(c) The court shall grant relief only if it determines any one or more of the following:
(1) The agency action, or the statute or rule and regulation on wihch the agency action is based, is unconstitutional on its face or as applied;
(2) the agency has acted beyond the jurisdiction conferred by any provision of law;
(3) the agency has not decided an

issue requiring resolution;
(4) the agency has erroneously interpreted or applied the law;
(5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;
(6) the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification;
(7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole, which included the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or
(8) the agency action is otherwise unreasonable, arbitrary or capricious.
(d) In making the foregoing determinations, due account shall be taken by the court of the rule harmless error."

STATEMENT OF THE CASE

This is a Title VII action claiming retaliation, sexual discrimination and harassment of Petitioner by KSU and some of its employees.

The facts material to this appeal are largely undisputed. On July 14, 1987, KSU

notified Petitioner of her dismissal effective July 17, 1987. On August 11, 1987, Petitioner appealed her dismissal to the Kansas Civil Service Board. The Kansas Civil Service Board conducted an evidentiary hearing pursuant to Kansas law. At the hearing, the Petitioner was represented by counsel. Several witnesses testified and many exhibits were offered. Petitioner complained before the Kansas Civil Service Board that she was dismissed in retaliation for filing charges of sexual discrimination and harassment. During the hearing, the Kansas Civil Service Board chairman, Billy Sparks, inquired of Petitioner's attorney "...the question as to whether or not she was retaliated against for filing these charges are now an issue in this case." The Petitioner's attorney replied "yes". At the close of the Kansas Civil Service

Board hearing, Petitioner included in her written memorandum of closing argument that she was dismissed in retaliation for filing sexual harassment complaints. On November 17, 1987, the Kansas Civil Service Board issued an order which included the following language:

> The Board did not find the appellant's unsatisfactory evaluations were the result of retaliation for filing sexual harassment complaints or complaints regarding her job description. Rather, the Board found the unsatisfactory evaluations, both of which were appealed, were the result of the appellant's inefficiency in the performance of her duties in the clinical mycology laboratory.

The Kansas Civil Service Board ordered the Petitioner reinstated but demoted. Petitioner has not received back pay to date. Petitioner timely filed a petition for rehearing of the decision of the Kansas Civil Service Board. The third issue raised in the petition was that the evidence clearly showed that the cause of

unsatisfactory evaluations was retaliation for filing civil rights complaints by appellant against appellee.

Petitioner's petition for rehearing was denied. In January, 1988, Petitioner then timely filed a petition for review of the order of the Kansas Civil Service Board in the District Court of Shawnee County, Kansas. In the petition for judicial review, Petitioner claimed that she was retaliated against for filing charges of sexual harassment at KSU. On August 1, 1988, the District Court of Shawnee County, Kansas, issued a memorandum and decision finding that the decision of the Kansas Civil Service Board would be adopted by the court and that the Kansas Civil Service Board acted properly within its statutory authority and jurisdiction. This order was then the subject of a motion to alter or amend judgment, which

was denied. On December 22, 1988, the Petitioner timely filed a notice of appeal to the Kansas Court of Appeals of the State of Kansas appealing the decision of the District Court of Shawnee County, Kansas. On appeal, Petitioner again raised the issue of retaliation. The Kansas Court of Appeals upheld the District Court of Shawnee County, Kansas. The Kansas Supreme Court granted review and upheld the district court also.

The crux of Petitioner's case is that the civil service proceedings are limited in scope and do not contain the same protection as the Kansas Act Against Discrimination. Appropriate burden of proof principles were not used by the Civil Service Board and the scope of review on appeal is limited.

The basis upon which the United States District Court granted KSU summary judgment

was that the the finding of the Kansas Civil Service Board that Petitioner was not retaliated against as reviewed by Kansas courts, was entitled to preclusive effect upon the issue pursuant to 28 U.S.C. 1738.

REASONS FOR ALLOWING THE WRIT

1. This case presents an important issue which necessitates review by this Court.

Petitioner contends, in this case, that it was an error of law for the United States District Court to give preclusive effect to a judicially reviewed decision of the Kansas Civil Service Board. The Petitioner contends that the civil service procedures were inadequate and that they passed judicial muster in state courts only because of the limited judicial review available. Petitioner feels she is entitled to a trial de novo on her Title

VII claim.

This issue was first raised by Petitioner in her response to KSU's motion for summary judgment in the United States District Court. Petitioner's position respecting this issue was further amplified in her motion to alter or amend judgment. The United States District Court ruled upon this issue in its order on summary judgment and its ruling on Petitioner's motion to alter or amend judgment. The Tenth Circuit entered its opinion upholding the District Court.

KSU argued below that since there was a state judicial decision upholding the finding of the Kansas Civil Service Board that the Petitioner was not retaliated against, Petitioner's case here should have been ended pursuant to the federal full faith and credit statute, 28 U.S.C. 1738. Petitioner disagrees.

It is important to emphasize at the outset that the state district court did not conduct a trial concerning the issue of retaliation. The only trial was conducted at the administrative level. The Kansas district court merely conducted a judicial review of the Kansas Civil Service Board's order. Under K.S.A. 77-618 and K.S.A. 77-619, a district court may not take additional evidence when reviewing a Kansas Civil Service Board decision, except in limited circumstances not applicable here. Under K.S.A. 77-621, a Kansas district court may only grant relief on evidentiary grounds when the relevant findings of fact are not supported by substantial evidence when viewed in light of the record as a whole. Interestingly, if Petitioner's retaliation claim had been administratively adjudicated pursuant to the Kansas Act Against

Discrimination rather than under the Civil Service Act, she would have been entitled to a trial de novo in state district court. (See, K.S.A. 77-618(b) and K.S.A. 44-1011.)

KSU relied primarily on Kremer v. Chemical Construction Co., 456 U.S. 461 (1986) for support if its motion for summary judgment. This case also provided the rule for the decision of the United States District Court.

In Kremer, the court held that the district court was required under 28 U.S.C. 1738 to give preclusive effect to a state court decision upholding a state agency's administrative decision concerning an employment discrimination claim. However, the court further went on to hold that the procedures provided by New York for the determination of the employment discrimination complaints, complimented by administrative as well as judicial review,

offered a full and fair opportunity to litigate the merits of the petitioner's claim and were sufficient under the Due Process Clause of the Fourteenth Amendment. The court also held that state proceedings need do no more than satisfy the minimum procedural requirements of the Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law. In Kremer, the state proceedings given full faith and credit by the federal court were the New York laws against discrimination not its civil service laws.

The holding in Kremer depended largely upon an extensive analysis of New York law. The New York laws reviewed in Kremer were specifically enacted to prohibit employment discrimination. The decision reviewed and which was given preclusive effect after judicial review,

was a decision of the New York State Division of Human Rights which was an agency charged with enforcing the New York law prohibiting employment discrimination.

The rationale developed in Kremer to support the proposition that Title VII had not impliedly repealed 28 U.S.C. 1738 as it applied to employment discrimination actions rested on an analysis of Title VII where the Supreme Court inferred that Congress intended state antidiscrimination laws and agencies to play an integral role in achieving Title VII objectives. Indeed, as the court notes, it is only after providing the appropriate state agency an opportunity to resolve the complaint, may an aggrieved individual press his complaint before the EEOC. 456 U.S. 469, 472, 473, 474, 475.

The rationale of the court also rested, in part, on the argument that no

provision of Title VII requires claimants to pursue in state court an unfavorable state administrative action, nor does the act specify the weight a federal court should afford a final judgment by state court if a remedy is sought.

Indeed, in Kremer, the court notes EEOC's statutory right to assess the adequacy of state laws and procedures for resolving administrative complaints. 456 U.S. 473. The linch pin of the court's conclusion that Title VII did not impliedly repeal 28 U.S.C. 1738 rests on the close relationship intended by Congress between state and federal antidiscrimination laws and agencies.

At the time of the Petitioner's civil service hearing, it appeared that due to a number of judicially imposed restrictions, Kansas public employees could not have taken advantage of their rights under

civil service laws and still retained the right to have their discrimination claims adjudicated by the Kansas Commission on Civil Rights (KCCR) pursuant to the Kansas Act Against Discrimination. K.S.A. 44-1001, et. seq.

The Kansas laws which proport to prevent discrimination and retaliation are set forth at K.S.A. 44-1001, et. seq. The KCCR, established pursuant to these statutes, is analogous to the New York agency considered in Kremer and the Kansas Act Against Discrimination is analogous to the New York laws considered in that case.

The Kansas Act Against Discrimination prohibits retaliation which is the subject matter of this litigation. K.S.A. 44-1009(a)(4).

The Kansas act contains the procedures for investigation, conciliation, and for a trial de novo in state district court if

discrimination is found. On its face, this statute would seem to provide equal treatment to public employees of the State of Kansas and to employees of private enterprise. However, due to a number of state court decisions, this is not true.

In the case of Neunzig v. Seaman U.S.D. 345, 239 Kan. 654 (1986), the Kansas Supreme Court held that the decision of a hearing committee established under the Teacher Tenure Act, K.S.A. 72-5436, et. seq., had res judicata effect on proceedings conducted by the KCCR and conducted pursuant to the Kansas Act Against Discrimination.

K.S.A. 75-2925 makes it clear that one purpose of the Civil Service Act is to prevent discrimination based on sex in state employment. Clearly, if Petitioner were terminated in retaliation for making sex discrimination complaints to

authorized civil rights enforcement agencies, the Kansas Civil Service Board would be able to hear it under Kansas law. K.S.A. 75-2925, et. seq. The Kansas Civil Service Board has jurisdiction to hear a retaliation complaint.

Thus, under the administrative res judicata principles set forth in Neunzig (claim preclusion), if Petitioner had not raised the issue of retaliation before the Kansas Civil Service Board, she would have lost her ability to raise it in any state administrative forum including the KCCR.

Here, the Petitioner did file a complaint before the KCCR, but under Neunzig, it is clear that the KCCR could not pursue this complaint because of the preclusive effect of the Kansas Civil Service Board order. In fact, the KCCR complaint was pending when the Kansas Civil Service Board order was issued.

It has been held that under Kansas law, even if a no probable cause determination is made by the KCCR, an employee may bring a civil action in tort in district court. Van Scoyk v. St. Mary's Assumption Parochial School, 224 Kan. 304 (1978). However, the Kansas Court of Appeals has held that before one can do this, one must exhaust their administrative remedies under the Civil Service Act, even if remedies under the Kansas Act Against Discrimination are exhausted. Mattox v. Dept. of Transportation, 12 Kan.App.2d 403 (1987).

As pointed out by KSU below, under Goetz v. Board of Trustees, 203 Kan. 340 (1969), a judicially reviewed administrative determination has preclusive effect in a subsequent judicial proceeding in Kansas.

At the time that Petitioner brought

her action before the state district court seeking review of the Kansas Civil Service Board's order, it was not clear whether the Kansas Civil Service Board's order respecting Petitioner's retaliation claim would have preclusive effect in a subsequent private tort action if no judicial review of that order was sought.

This issue was resolved in Parker v. Kansas Neurological Institute, 13 Kan.App. 2d 685, 778 P.2d 390 (Kan.App. 1989). The decision in this case was entered on August 25, 1989. In that case, the Kansas Court of Appeals states point blank that --

> [U]ntil such time as the Kansas Legislature specifically states that an administrative action is the exclusive remedy for a discrimination claim, a negative finding by the Civil Service Board or a finding of no probable cause by the KCCR does not preclude a subsequent action in the district court for discriminatory discharge.

It should be noted that in the Parker case,

the plaintiff there suffered an adverse decision of the the Kansas Civil Service Board, which was affirmed by the district court and the Kansas Court of Appeals.

The rationale which distinguished Parker, according to the United States District Court, was that the plaintiff there was alleged to have abandoned the civil rights claim at the district court level.

Thus, since Parker was decided in August, 1989, it appears that one may abandon a civil rights claim during the Kansas district court review of a civil service board order, and this renders res judicata principles inapplicable to a tort action filed under Van Scoyk. However, this was by no means clear when Petitioner first brought her state court action before the District Court of Shawnee County.

The result in Parker is correct.

Specific administrative agencies and judicial procedures have been developed by the relevant legislative bodies to address employment discrimination issues. These procedures were enacted in addition to existing civil service laws because those laws were ineffective as a means to resolve employment discrimination complaints.

Protection under Title VII was extended to state and local employees in 1972. The legislative history of these amendments is replete with documentation that state and local governments had been guilty of discrimination and that, because of this, Congress specifically intended to include state civil service employees under the protection of Title VII. On this topic the House Report states as follows:

> "The problem of employment discrimination is particularly acute and has the most deleterious effect in these governmental activities which are most visible to the minority communities

(notably education, law enforcement, and the administration of justice) with the result that the credibility of the government's claim to represent all the people equally is negated.

This widespread discrimination is evidence that State and local governmental units have not instituted equal employment opportunity required by the national policy to eliminate discrimination in employment. In its 1969 report, For All the People...By All the People, the U.S. Civil Rights Commission concludes that:

> The basic finding of this report is that State and local governments have failed to fulfill their obligation to assure equal job opportunity. . . . Not only do State and local governments consciously and overtly discriminate in hiring and promoting minority group members, but they do not foster positive programs to deal with discriminatory treatment on the job.

The Constitution is as imperative in its prohibition of discrimination in state and local government employment as it is in barring discrimination in Federal jobs. The courts have consistently held that discrimination by state and local governments, including job discrimination, violates the Fourteenth Amendment and is prohibited.

While an individual has a right of action in the appropriate court if he

has been discriminated against, the adequacy of protection against employment discrimination by state and local governments has been severely impeded by the failure of Congress to provide Federal administrative machinery to assist the aggrieved employee. There are two exceptions. Federal Merit Standards provisions are applied to approximately 250,000 state employees where the Federal and state governments participate jointly in furnishing government services, and there are nondiscrimination requirements Department of Housing and Urban Development (HUD) contracts which are applicable to approximately 900 local urban renewal agencies and 2,000 local public housing authorities.

Otherwise, state and local governments constitute the only large group of employees in the nation who are almost entirely exempt from Federal nondiscrimination protections. Although the aggrieved individual may enforce his rights directly in the Federal district courts, this remedy, as already noted, is frequently an empty promise due to the expense and time involved in pursuing a Federal court suit. It is unrealistic to expect disadvantaged individuals to bear the burden.

The Committee feels that it is an injustice to provide employees in the private sector with an administrative forum in which to redress their grievances while at the same time, denying a similar protection to the increasing number of state and local

employees. Accordingly, H.R. 1746 provides the administrative remedies available to employees in the private sector should also be extended to state and local employees." (Emphasis added.)

House Report No. 92-238, reprinted in 1972 U.S. Code Cong. & Ad. News at 2137, 2153-2154.

Further, the Joint Explanatory Statement states the following:

"The House receded with an amendment exempting, in addition to State and local government elected officials, persons chosen by such officials to be on their personal staffs, appointees of such officials on a policymaking level or immediate advisors of such elected officials. The exemption does not include civil service employees.

It is the intention of the conferees to exempt elected officials and members of their personal staffs, and persons appointed by such elected officials as advisors or to policy-making positions at the highest levels of the departments or agencies of State or local governments, such as cabinet officers, and persons with comparable responsibilities at the local level. It is the conferees intent that this exemption shall be construed narrowly. Also, all employees subject to State or local civil service laws are not

exempted. (Emphasis added.)

Joint Explanatory Statement of Managers at the Conference on H.R. 1746 to Further Promote Equal Opportunities for American Workers, reprinted in 1972 U.S. Code Cong. and Ad. News at 2179, 2180.

It is clear that Congress considered existing state civil service systems as inadequate to provide protection against discrimination. This is clearly the reason that Congress included state and local employees within the ambit of Title VII.

In Kremer, the court, when considering the legislative history of Title VII, states that:

> Members of Congress agreed that the States should play an important role in enforcing Title VII, but also felt the federal system should defer only to adequate state laws.

(456 U.S. at 472.)

Congress could not have intended that procedures conducted under state civil service laws, even if judicially reviewed, would be adequate under Title VII. Only

state laws specifically designed to combat discrimination are adequate to support federal deferral. Indeed, state and local employees were included under Title VII because state civil service laws and agencies did not properly protect the rights of minorities and women.

In Kremer, as in many other cases, the court recognizes that due process is a flexible concept. 456 U.S. 483. Different procedures apply in different situations. In that case, it is recognized that where there are state laws specifically designed to combat discrimination and where there is a state agency with specific expertise to enforce such laws, the judicially reviewed results of such process are entitled to preclusive effect pursuant to 28 U.S.C. 1738 in a Title VII case. As pointed out above, the situation is different here.

Congress considered civil service systems to be part of the problem, not part of the solution, when enacting Title VII. Congress intended to grant state and local employees additional rights when enacting Title VII. It intended to provide special procedures, administrative and judicial, for guaranteeing that state and local employees were free from improper discrimination or retaliation.

Indeed, Petitioner's principal argument concerning the inadequacy of the Kansas Civil Service Board procedure in adjudicating her retaliation complaint was that the analysis of the evidence by the Kansas Civil Service Board in its order did not comport with the standard manner of analysis in such cases. There is no indication in the board's order that the shifting burden of proof utilized in Kansas

and federal courts to adjudicate employment discrimination cases was utilized by the board in Petitioner's civil service hearing. This issue was raised in the state appeal by Petitioner, but not relief was granted. The Tenth Circuit rejected the argument on the basis that it had no duty to supervise state court actions in this regard.

In sum, this Court should limit the holding in Kremer to those instances where state antidiscrimination laws have been utilized to adjudicate a discrimination claim. The preclusion doctrine of 28 U.S.C. 1738 should not be expanded to embrace results of civil service tribunals, even if judicially reviewed. Such expansion frustrates the intention of Congress in bringing state civil service employees within the ambit of Title VII.

Here, through case law and statute, Petitioner has been denied a judicial trial of her retaliation claim at the state and federal level. She has only been given a hearing before the Kansas Civil Service Board, a board then comprised of white males, regarding these issues. This contrasts with Congressional intent when state employees were brought under the ambit of Title VII. This case presents an important issue concerning the application of the Kremer decision to state civil service board decisions, and the decision of the Tenth Circuit Court of Appeals should be reversed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the writ of certiorari be allowed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

LOIS MORALES,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. 90-3003
v.	)	(D. Kansas)
	)	(DC No. 88-4208-R)
KANSAS STATE UNIVERSITY; KANSAS BOARD OF REGENTS; JON WEFALD, President of Kansas State University,	)	
	)	
Defendants-Appellees.	)	

ORDER AND JUDGEMENT*

Before **McKay**, **Moore** and **Brorby**, Circuit Judges.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3

argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

This is an appeal by an employee whose Title VII action claiming retaliation, discrimination, and harassment was decided in favor of the employer.

The parties agree the facts are undisputed. Employee was discharged and appealed her dismissal to the Kansas Civil Service Board. This board conducted a full and complete evidentiary hearing, concluding that employee's dismissal was due to inefficiency of performance and was not the result of discrimination or retaliation. Employee asked for a rehearing, which was denied, and then filed a petition for review in the Kansas State District Court, which sustained the findings and

conclusions of the Kansas Civil Service Board. This decision was appealed to the Kansas Court of Appeals, which upheld the district court decision. Employee then appealed this decision to the Kansas Supreme Court where it has been argued and is awaiting a decision.

Employee then commenced this suit in United States District Court, which granted employer's motion for summary judgment holding that employee was precluded from bringing this action based upon the doctrine of collateral estoppel.

Employee now asserts the United States District Court erred because neither the decision of the Kansas Civil Service Board nor the decision of the Kansas State District Court is entitled to preclusive effect. Employee argues that procedures conducted under state civil service laws, even if judicially reviewed,

are not adequate under Title VII.

We view Scroggins v. State of Kansas, 802 F.2d 1289 (10th Cir. 1986), as being dispositive. This court there held that this circuit will not hesitate to apply 28 U.S.C. 1738 (state judicial proceedings are entitled to full faith and credit in every court within the United States) to actions arising under Title VII. In order to invoke this rule, we held in Scroggins, there must exist a clear indication that either the plaintiff had a full and fair opportunity to litigate his claim and that the court hearing the claim had the authority to adjudicate the merits.

In our case, it is clear that the state court had the authority to adjudicate the merits, therefore the precise question before this court, based upon Scroggins, is whether or not the record contains a clear indication that employee had a full and

fair opportunity to litigate her claim.

The United States District Court, in its Memorandum and Order of November 28, 1989, thoroughly reviewed the applicable Kansas law and the transcript of the hearing before the Kansas Civil Service Board. The United States District Court stated, in part, as follows:

> Here, the issue of retaliation was fully litigated .... The hearing before the board lasted two days. Plaintiff was represented by counsel throughout the proceedings. Seventeen witnesses testified and sixty exhibits were entered into evidence .... Counsel for plaintiff made it quite clear that plaintiff contended that she had been dismissed from her position in retaliation for filing a previous civil rights complaint .... [T]he Board found that plaintiff had been dismissed because she had received two consecutive unsatisfactory performance evaluations .... The Board further specifically found that plaintiff's "unsatisfactory evaluations were [not] the result of retaliation ...." Plaintiff then filed a petition for review in the District Court .... In this petition, plaintiff requested the court to make a finding that she received the unsatisfactory evaluations in

> retaliation .... The state district court affirmed the findings of the Board ....

Employee's principal argument concerning the inadequacy of the Kansas Civil Service Board was that the analysis of the evidence "did not comport with the standard manner of analysis in such cases" in that "[t]here is no indication in the board's order that the shifting burden of proof utilized in Kansas and federal courts to adjudicate employment discrimination cases was utilized by the board in Plaintiff's civil service hearing." [Appellant's Brief at 15.] Employee's argument is flawed. A federal court does not sit to correct errors in state court. We may entertain employee's case only if she was denied a full and fair opportunity to litigate her claim.

Employee argues that Kremer v.

Chemical Constr. Corp., 456 U.S. 461 (1982), mandates that we not afford preclusive effect to a state civil service board's determination. Employee overlooks the fact that the Court in Kremer and the United States District Court here both gave preclusive effect not to the agency's decision but rather to the state court's decision reviewing the agency's decision. The Kremer analysis extends to a state court decision reviewing an administrative decision. Rider v. Commonwealth of Pennsylvania, 850 F.2d 982 (3d Cir.), cert. denied, 109 S. Ct. 556 (1988) (arbitration decision); Carlisle v. Phenix City Bd. of Educ., 849 F.2d 1376 (11th Cir. 1988) (a teacher tenure proceeding); Burney v. Polk Community College, 728 F.2d 1374 (11th Cir. 1984) (counselor dismissal proceeding).

Employee has no right to a de novo

trial in federal court absent a showing that she was denied a full and fair opportunity to litigate her claim or that the court hearing the claim lacked the authority to adjudicate the claim on the merits. Employee failed to make the requisite showing.

Employee argues that no preclusive effect should be given to the state court judgment until all appeals are exhausted. We disagree. If the Kansas Supreme Court reverses, employee may receive the relief she requests and if the Kansas Supreme Court affirms, employee has still received a full and fair opportunity to litigate her claim. Therefore, there exists no reason for the district court to defer its decision.

The decision of the district court is **AFFIRMED.**

Entered for the Court:

WADE BRORBY
United States Circuit Judge

(2)

90-371

NO. 90- _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

LOIS MORALES,

Petitioner,

vs.

KANSAS STATE UNIVERSITY,
KANSAS BOARD OF REGENTS, and
JON WEFALD, PRESIDENT OF KANSAS
STATE UNIVERSITY,

Respondents.

ON WRIT OF CERTIORARI TO THE
TENTH CIRCUIT COURT OF APPEALS

BRIEF OF RESPONDENTS IN OPPOSITION

Dorothy L. Thompson
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Attorney for Respondents

QUESTION PRESENTED

Respondents concur with petitioner's statement of the question presented.

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Lois Morales v. Kansas State University, 727 F.Supp. 1389 (1989).

Lois Morales v. Kansas State University, Case No. 90-3003 (D. Kan., filed May 30, 1990), see Appendix A, Petition.

STATUTES INVOLVED

The only statute involved in this case is 28 U.S.C. 1738 as set out in the petition. Other statutes set out in the petition are not involved.

STATEMENT OF THE CASE

The Title VII claim in this case is limited to retaliation. Petitioner did not claim sexual discrimination or harassment.

Respondents concur with the

remainder of petitioner's statement of the case.

SUMMARY OF ARGUMENT

Kremer v. Chemical Construction Corporation, 456 U.S. 461 (1982) requires that in Title VII actions, 28 U.S.C.S. §1738 requires federal courts to give preclusive effect to state court judgments. There is no basis for denying finality to state court judgments arising out of state administrative proceedings from agencies whose roles are not limited exclusively to civil rights enforced. A denial of finality of such judgment is contrary to the entire body of federal court precedent.

State court decisions did

not require petitioner to raise her retaliation claim in state court or deny her access to federal court to pursue her Title VII claim. However, her decision to litigate her claim in state court prevents her relitigating that claim in federal court.

REASONS FOR DENYING THE WRIT

A. STATE COURT DECISIONS REVIEWING DETERMINATIONS OF ADMINISTRATIVE AGENCIES OTHER THAN CIVIL RIGHTS AGENCIES HAVE PRECLUSIVE EFFECT.

Kremer v. Chemical Construction Corporation, 456 U.S. 461 (1982) determined that in Title VII actions, 28 U.S.C.S. §1738 requires federal courts to give preclusive effect to state court judgments.

Plaintiff argues that only a state court decision pursuant to a review of an order of the Kansas Civil

Rights Commission should be accorded preclusive effect under the authority of Kremer v. Chemical Construction Corporation, supra. However, a review of cases in the federal courts reveals that no such restriction on the Kremer ruling exists. Preclusion has been dictated by Kremer as a result of state court decisions arising out of the review of decisions from a variety of agencies. See e.g., Leong v. Hilton Hotels Corp., 698 F.Supp. 1496, 48 F.E.P. Cases 535 (D. Hawaii, 1988) (unemployment compensation decision); Carlisle v. Phoenix City Board of Education, 849 F.2d 1376, 47 F.E.P. Cases 616 (11th Cir. 1988) (teacher tenure proceeding); Rider v. Commonwealth of Pennsylvania, 850 F.2d 982, 47 F.E.P. Cases 198 (3rd Cir.

1988) (arbitration decision); Levitt v. University of Texas at El Paso, 47 F.2d 221, 47 F.E.P. Cases 90 (3rd Cir. 1988) (university tribunal); Garrett v. City and County of San Francisco, 818 F.2d 1515, 44 F.E.P. Cases 865 (9th Cir. 1987) (Fire Commission); Cooper v. City of North Olmstead, 795 F.2d 1265, 41 F.E.P. Cases 425 (6th Cir. 1986) (unemployment compensation decision); Hill v. Coca Cola Bottling Company of New York, 786 F.2d 550, 40 F.E.P. Cases 639 (2nd Cir. 1986) (unemployment compensation proceeding); Hirst v. State of California, 770 F.2d 776, 38 F.E.P. Cases 1496 (9th Cir. 1985) (State Personnel Board); Burney v. Polk Community College, 728 F.2d 1374, 34 F.E.P. Cases 727 (11th Cir. 1984)

Community College Board of Trustees). In all of the cases cited, preclusive effect was given to state court holdings reviewing administrative decisions. None of these agencies is restricted its role to enforcement of state civil rights statutes. Burney v. Polk Community College, at 728 F.2d at 1377, 34 F.E.P. Cases 730-31, responds directly to the objection to preclusion raised by the petitioner. After citing Kremer at some length, the Burney court goes on to state that "the destructive effect of stripping state court judgments of finality is equally applicable to state court judgments affirming that a claim of employment discrimination is unproven made by a state administrative agency other than that expressly authorized

to determine employment discrimination claims." Burney at 731. Clearly, plaintiff's rationale for reducing the full faith and credit requirement of §1738 as dictated in Kremer is contrary to existing federal court precedent.

B. KANSAS DECISIONS DO NOT LIMIT PLAINTIFF'S ACTS AS TO FEDERAL COURT.

In exercising her rights under Title VII, plaintiff also argues that Kansas cases somehow barred or limited her access to federal court in exercise of her right to litigate her retaliation claim under Title VII. She cites Neunzig and Kansas Commission on Civil Rights v. Seaman U.S.D. 345, 239 Kan. 654 (1986) and Mattox v. Department of Transportation, 12 Kan.App.2d 403

(1987). Neither Neunzig nor Mattox have any bearing on the issues involved in this case. Plaintiff filed an appeal of her dismissal from her civil service position with the State Civil Service Board. Before the Board she claimed that she was being dismissed in retaliation for filing claims of sexual harassment. The Board found that she was not dismissed in retaliation for filing such claims. Under authority of the Neunzig case, the Kansas Civil Rights Commission (KCCR) might indeed be without jurisdiction to entertain the same claim of retaliation. However, petitioner also filed her complaint with the Equal Employment Opportunity Commission (EEOC). Under deferral rules, EEOC need only wait 60 days

before proceeding under federal law. 42 U.S.C.S. §2000e-5(c). Thus if there was indeed any restriction on the jurisdiction of the KCCR's result of the Neunzig case, it did not affect her rights under Title VII of the Federal Civil Rights Act. Likewise, Mattox, which requires exhaustion of available administrative remedies before filing suit in Kansas courts, did not prevent her from pursuing her Title VII claim.

Plaintiff devotes several pages of her petition to remonstrances against the state judicial rulings that may have led her to appeal the Civil Service Board decision to the Shawnee County District Court. We do not know her reasons for doing so. However, when she decided to invoke

the Kansas courts to review the order of the Board with respect to her retaliation claim, she foreclosed, under the Kremer decision, her opportunity to relitigate that claim in federal court.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dorothy L. Thompson, hereby certify that I served three copies of

the foregoing Respondents Brief in Opposition by depositing the same in the U.S. mail, postage prepaid, this 12th day of September, 1990, addressed to:

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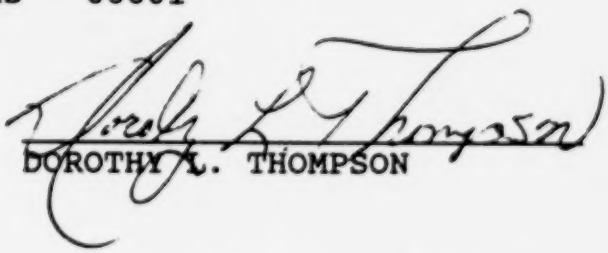

DOROTHY A. THOMPSON